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BEFORE THE
SURFACE TRANSPORTATION BOARD

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INTERMOUNTAIN POWER AGENCY Complainant, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	)	Docket No. 42127

UNION PACIFIC RAILROAD COMPANY'S REPLY TO COMPLAINANT'S PETITION TO SUPPLEMENT THE RECORD

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SURFACE TRANSPORTATION BOARD

INTERMOUNTAIN POWER AGENCY	)	
Complainant,	)	
v.	)	Docket No. 42127
UNION PACIFIC RAILROAD COMPANY,	)	
Defendant.	)	

UNION PACIFIC RAILROAD COMPANY'S REPLY TO COMPLAINANT'S PETITION TO SUPPLEMENT THE RECORD

INTRODUCTION

The Board should deny the "Petition to Supplement the Record" filed by Intermountain Power Agency ("IPA"). IPA is not seeking to supplement the record; it wants to file a new case-in-chief. Union Pacific Railroad Company ("UP") has spent large amounts of employee time and very substantial amounts of money for outside counsel and consultants to respond to IPA's opening evidence. Now, after reviewing UP's reply evidence in this proceeding and the Board's recent decision in *Arizona Electric Power Cooperative v. BNSF Railway & Union Pacific Railroad*, STB Docket No. 42113 (STB served Nov. 22, 2011) ("*AEPCO*"), IPA wants to eliminate "more than a third of the SARR system that [it] had included in its August 10, 2011 opening evidence" and reserve for itself the unlimited right to "make further adjustments to its stand-alone system as well." (Petition at 2.) IPA filed its complaint more than one year ago, and it was just a few weeks from filing its rebuttal evidence when it asked the Board for an unlimited right to a "do-over." Board precedent prohibits IPA from altering its case-in-chief to avoid the

consequences of the strategic choices it made in designing its SARR. *See, e.g., PPL Montana, LLC v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 752, 762 (2003).

Even if IPA's plan to drastically reconfigure its SARR system and make other unspecified changes could be characterized as supplementing the record, IPA has not met the threshold test the Board applies before allowing a party to supplement the record in a rate case – that is, IPA has not "demonstrat[ed] that the material sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the case." *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, slip op. at 4 (STB served Mar. 25, 2003).

Instead, IPA presents the Board with a false choice by claiming that, if it does not obtain the relief it seeks though its Petition, it could dismiss this case and "file a new complaint." (Petition at 2.) The Board's precedents support a different result: IPA's dismissal of its case at this late stage should have the same effect as a Board decision finding that the challenged rates are reasonable. The Board should make clear that IPA will not be allowed to circumvent the rules that limit relitigation of settled decisions by abandoning its case after reviewing the opposing evidence. Like any unsuccessful litigant, IPA should be required to show material error, new evidence, or substantially changed circumstances before it may file a new complaint challenging the same common carrier rates it had previously challenged. *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 69 (STB served Oct. 30, 2006).

If the Board does allow IPA to submit new evidence, it should take three steps to reduce the harmful impact on UP. The Board should (i) require IPA to waive any right to reparations for the period before the Board serves its decision granting IPA's Petition; (ii) preclude IPA from relitigating the cost-of-capital and terminal value issues the Board resolved in *AEPCO* and from

making any other changes to its evidence that are not directly related to the decision to eliminate the portion of its SARR from Price to Provo, Utah; and (iii) allow the parties an opportunity to negotiate a procedural schedule that takes account of competing demands on the time of UP personnel and outside counsel and consultants.

Regardless of whether the Board allows IPA to submit new evidence, UP believes the Board is bound by 49 U.S.C. § 11701 to complete this case within three years of IPA's filing of the complaint. UP raises this issue now in an abundance of caution, to avoid any claim that UP has forfeited this argument. *See BNSF Ry. v. STB*, 604 F.3d 602 (D.C. Cir. 2010).

BACKGROUND

IPA filed its complaint on December 22, 2010. In its complaint, IPA asked the Board to prescribe maximum reasonable rates for transportation of unit-train movements of coal to IPA's Intermountain Generating Station ("IGS") at Lynndyl, Utah, from one Utah mine (the Skyline Mine), one Utah coal loadout (the Savage Coal Terminal), and one point of interchange with Utah Railway Company ("URC") in Provo, Utah.

IPA's decision in both its December 2010 complaint and its August 2011 opening evidence to challenge UP's rates from Skyline Mine, the Savage Coal Terminal, and the Provo interchange with URC apparently reflected careful consideration by IPA of its coal supply needs. When UP initially established common carrier rates for transporting coal to IPA on December 1, 2010, UP understood that IPA did not intend to ship coal from Skyline Mine in 2011. (UP Reply Exh. V-5.) UP therefore did not publish a rate from Skyline Mine in its tariff, but it provided a rate quote and told IPA that it would publish that rate if IPA's plans changed. (*Id.*) A few days later, IPA told UP that it did plan to ship coal from Skyline Mine in 2011, and it asked UP to publish the rates. (*Id.*, Exh. V-6.) UP complied with IPA's request. (*Id.*, Exh. V-7.) {

} (UP Reply at III.A-4, Table III.A.1.)

IPA's focus on coal supply was again apparent in June 2011, after this proceeding had been underway for more than half a year. On June 24, IPA filed a motion asking for additional time to file its opening evidence. IPA told the Board that it was still finalizing its plans for future coal purchases, and that an extension of time would "permit the parties to base their evidence on the most accurate information available regarding future traffic patterns and volumes." (Motion for Extension of Schedule at 2.) UP did not object to IPA's request, and the Board granted the requested extension. *See Intermountain Power Agency v. Union Pac. R.R.*, STB Docket No. 42127 (STB served July 6, 2011).

In its opening evidence, IPA confirmed it was seeking a prescription of future rates for transportation of coal from Skyline Mine, the Savage Coal Terminal, and the Provo interchange with URC to IGS. (IPA Opening Nar. at I-30 to I-31.) IPA specifically designed its SARR to provide local service from both the Savage Coal Terminal and Skyline Mine to IGS. (*Id.* at III-B-1 to III-B-4.) IPA concluded its submission by asking the Board to prescribe maximum lawful rates that would be well below the challenged rates and to award reparations for past movements. (*Id.* at III-H-10 to III-H-16.)

UP filed its reply evidence on November 10, 2011. UP's reply showed that IPA had used flawed methods or assumptions in almost every step of its analysis, and that when those errors are corrected, the challenged rates prove to be reasonable. (UP Reply at III.H-7, Table III.H.2.)

IPA filed its Petition approximately one month after UP filed its reply. IPA now says it wants to submit new opening evidence for a redesigned SARR that would not serve Skyline Mine or the Savage Coal Terminal. Allowing IPA to proceed with this proposal would impose

substantial costs and burdens on UP. UP has paid more than $1 million in legal and consulting fees for work involved in analyzing the SARR that IPA presented in its opening evidence and preparing UP's reply evidence. Numerous UP employees have devoted substantial time assisting in the preparation of the reply evidence. UP will plainly incur significant additional expenses if IPA is allowed to redesign its SARR and submit new opening evidence.

ARGUMENT

I. THE BOARD SHOULD NOT ALLOW IPA TO FILE NEW OPENING EVIDENCE BASED ON A RECONFIGURED STAND-ALONE RAILROAD.

IPA identifies four factors that purportedly prompted it to file its Petition and entitle it to reformulate its case-in-chief, but those factors do not justify such relief, either individually or in the aggregate. IPA apparently believed it had cobbled together a convincing case, but now that the errors in its approach have been exposed, it is flailing about for alternatives. Allowing IPA to redesign its SARR because it wants to revisit certain strategic choices it made in litigating this case would be contrary to precedent. In addition, IPA has not shown that the new evidence that it wants to introduce "could not reasonably have been introduced earlier," and it makes no effort to show that, at the end of the day, it "would materially influence the outcome of the case." *Duke Energy*, slip op. at 4. If IPA were allowed to resubmit its opening evidence based on the flimsy excuses it has offered, the Board would have no principled way of limiting future requests by other complainants seeking "do-overs."

A. UP's Position Regarding IPA's Right To Prescriptions Of Maximum Rates For Potential Transportation Of Coal From Skyline Mine And The Savage Coal Terminal Does Not Entitle IPA To Reconfigure Its SARR.

IPA's primary argument that it should be allowed to redesign its SARR involves its claim that UP took the "position that the scope of the Board's analysis should be limited to the UP [rate from the Provo interchange with URC]," and is "insisting that the Board limit its analysis to the

reasonableness of [that] rate." (Petition at 5-6.) IPA further asserts that this created a "mismatch between UP's legal claim and its reply evidence," and that IPA must redesign its SARR so the Board can analyze the reasonableness of the Provo rate apart from the other rates. (*Id.* at 7.) There are several flaws in IPA's argument, each of which is fatal.

First, UP never took the position that IPA claims – that is, UP never said the Board's analysis should be limited to the rate from the Provo interchange with URC. Rather, UP urged the Board not to prescribe maximum rates for future UP single-line transportation of coal from Skyline Mine or the Savage Coal Terminal to IGS because IPA's evidence showed that IPA did not plan to use those rates in the foreseeable future. (UP Reply at I-12 to I-18.)[1] UP *never* asked the Board to limit the scope of its SAC analysis to exclude coal moving to IGS from those origins: UP's argument applied only "if the Board were to find that the challenged rates are unreasonable." (*Id.* at I-12.) Indeed, IPA was clearly entitled to challenge UP's rate {

}. IPA is attacking a straw man.

Second, IPA does not believe that UP's actual argument will prevail – IPA's professed concerns are merely an excuse to redesign its SARR. IPA says it wants to proceed "[w]ithout conceding the merits of UP's argument." (Petition at 7.) IPA's refusal to concede the issue is understandable, because the Board rejected UP's argument in a rate case it decided just two weeks before IPA filed its Petition, but after UP filed its reply. *See AEPCO*, slip op. at 38-39. In

[1] In its reply, UP treated the reason for its argument as Highly Confidential. However, IPA revealed this information in its Petition, so UP understands that IPA does not consider the information to be Highly Confidential.

short, even if IPA had been concerned about UP's argument, its concerns should have vanished once the Board issued its *AEPCO* decision.

Third, even if UP had argued that the Board's analysis should not include the Skyline Mine and Savage Coal Terminal rates, and even if the Board agreed, IPA still would not need to redesign its SARR to avoid an evidentiary "mismatch." (Petition at 7.) IPA wants to eliminate the portion of the SARR between Provo and Price, Utah, but there is no traffic moving on that segment that IPA could not include in a SAC presentation designed to challenge only UP's rate from the Provo interchange with URC. The Price to Provo segment would be no different from the Milford to Lynndyl segment that IPA includes in its SARR: it would not be used by the issue traffic, but it would be used by cross-over traffic that shares facilities with the issue traffic. *See Otter Tail Power Co. v. BNSF Ry.*, STB Docket No. 42071, slip op. at 10 (STB served Jan. 27, 2006); *see also AEPCO*, slip op. at 9 ("[I]t is well established that there is no requirement that the issue traffic share facilities with all of the traffic on the SARR.").[2]

In short, IPA has no need to redesign its SARR to address either the arguments that IPA incorrectly attributes to UP or the arguments that UP actually made. IPA's claims relating to these issues do not show that the new evidence IPA wants to introduce "could not reasonably have been introduced earlier" and "would materially influence the outcome of the case." *Duke Energy*, slip op. at 4.

[2] Of course, as is the case with the Milford to Lynndyl segment, a cross-subsidy analysis would be needed to ensure that traffic using only the Price to Provo segment was not being used to create a cross subsidy. (*See* UP Reply at III.H-13 to III.H-14.)

B. The Board's Decisions In *AEPCO* Regarding The SARR's Cost-Of-Capital And The Calculation Of The Terminal Value Of The SARR Do Not Entitle IPA To Reconfigure Its SARR.

IPA's second line of attack is to blame the Board. IPA says it relied on arguments about the SARR's cost-of-capital and the approach to calculating the terminal value of the SARR that the Board rejected in *AEPCO*, and IPA implies it would have designed its SARR differently if only it had known what the Board would say in *AEPCO*. (Petition at 7.) However, the Board's decisions in *AEPCO* on the cost-of-capital and terminal value issues reflected straightforward applications of SAC precedent and principles. With respect to the cost-of-capital issue, the Board reaffirmed that it will apply the industry-wide cost-of-equity, unless a party shows "that a different level of capital costs tailored to the SARR at issue should be used because that SARR's underlying characteristics are unique to the industry at large." *AEPCO*, slip op. at 137 (citing *FMC Wyo. Corp. v. Union Pac. R.R.*, 4 S.T.B. 699, 846 (2000); *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 544 n.63 (1985)). With respect to the terminal value issue, the Board simply corrected a "flaw" in its DCF model. *Id.* at 140.

IPA chose an aggressive approach to litigating this case by urging the Board to depart from its standard use of the railroad industry of the cost-of-equity and hoping the Board would decline to correct a flaw in its DCF model. The Board's rejection of those arguments in *AEPCO* does not entitle IPA to a "do-over." As the Board explained in a similar context: "Were we to allow a disappointed party to revise its case in response to our rulings, there could be no end to an administrative proceeding." *PPL Montana*, 6 S.T.B. at 762.[3] A complainant in a rate case,

[3] In *PPL Montana*, the Board proceeded to say that the disappointed party could simply file a new complaint. However, as discussed below, the Board subsequently recognized that an unsuccessful litigant should be required to show material error, new evidence, or substantially changed circumstances before it is allowed to file a new complaint challenging the same common carrier rates it had previously challenged. *See Major Issues*, slip op. at 69.

"having the responsibility to engineer a SARR and present it to the Board in the first instance, cannot seek to modify it simply because the Board finds the SARR unacceptable based on a reasonable application of [*Coal Rate Guidelines*'] principles." *PPL Montana, LLC v. STB*, 437 F.3d 1240, 1247 (D.C. Cir. 2006). A party in a SAC case "assumes the risk" of its "strategic choice[s]." *PPL Montana, LLC v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 19, 20 (2003).

In short, IPA knew there was a risk that the Board would reject its arguments when it filed its opening evidence. Moreover, IPA has not even attempted to articulate a connection between its rejected arguments and its request to dramatically reconfigure its SARR. Thus, IPA's claims relating to its rejected arguments do not show that the new evidence IPA wants to introduce "could not reasonably have been introduced earlier" and "would materially influence the outcome of the case." *Duke Energy*, slip op. at 4.

C. IPA's Acknowledgement Of Errors In The ATC Calculations In Its Opening Evidence Does Not Entitle IPA To Reconfigure Its SARR.

The third factor that IPA identifies as a reason why it should be allowed to reconfigure its SARR is that the Average Total Cost ("ATC") calculations in its opening evidence reflected an error. Specifically, IPA recognizes that it overstated the share of cross-over movement revenues available to the SARR. (Petition at 4 & n.4.) Board precedent does not allow submission of supplemental evidence in this situation. This is not a case in which accurate evidence "could not reasonably have been introduced earlier." *Duke Energy*, slip op. at 4. IPA could have presented accurate calculations in its opening evidence. In any event, UP identified and corrected the error on reply. (UP Reply at III.A-24.) Nothing prevents IPA from incorporating this correction in its rebuttal evidence.

Moreover, IPA does not claim that it would have designed its SARR differently if it had identified the error earlier. But even if IPA had made that claim, it would not be a valid basis for

allowing IPA to reconfigure its SARR. Particularly in a SAC case, which involves hundreds of complex calculations, if a party were permitted to revisit all of the strategic choices that might have stemmed from its errors, "there could be no end to an administrative proceeding." *PPL Montana*, 6 S.T.B. at 762. New evidence a party wants to introduce after identifying an error and re-evaluating its strategic choices is not evidence that "could not reasonably have been introduced earlier." *Duke Energy*, slip op. at 4.

D. IPA's "Conclusion That Its Future Generating Interests Will Be Best Served By Limiting Its Challenge To The Provo to IGS Rate" Does Not Entitle IPA To Reconfigure Its SARR.

The fourth factor that IPA identifies as a reason why the Board should allow it to reconfigure its SARR is "IPA's conclusion that its future electric generating interests will be best served by limiting its challenge to the Provo to IGS rate rather than also seeking the prescription of a single-line UP rate from Savage and Skyline." (Petition at 3-4.) This appears to be nothing more than a confession that IPA now believes it can obtain a more favorable result in this case if it reconfigures its SARR. IPA makes a cryptic reference to the fact that "ongoing developments regarding IPA's specific plans for future coal purchases led to the extension of the original due date for opening evidence in this case." (*Id.* at 4 n.3.) But IPA does not claim that its plans for future coal purchases changed since it filed its opening evidence. As discussed above, IPA's opening evidence showed that IPA did not plan on obtaining any additional coal from Skyline Mine or the Savage Coal Terminal using UP single-line rates in the foreseeable future. The only thing that has changed since IPA filed its opening evidence is that IPA now regrets some of the strategic choices it made when designing its SARR.

In the end, IPA is left to argue that it should be given a dispensation to reconfigure its SARR because the Board's "role in stand-alone cases is fundamentally different than that of a court." (Petition at 8.) But the case law does not support IPA's request for a "do-over." As IPA

observes, the Board has expressed some reluctance "to deny or dismiss a rail rate challenge on procedural grounds or because the record is inadequate, when the defendant railroad has declined to contribute to the development of an adequate record" and the Board thus lacked "an adequate record upon which the Board [could] make a fair and informed assessment of the reasonableness of a challenged rate." *Ariz. Elec. Power Coop., Inc. v. Burlington N. & Santa Fe Ry. & Union Pac. R.R.*, 7 S.T.B. 224, 225 (2003).[4] But UP is not asking the Board to deny or dismiss IPA's rail rate challenge, UP is not arguing that the record is inadequate, and UP has not declined to contribute to the development of an adequate record. To the contrary, thanks to UP's diligent efforts to identify and correct IPA's many errors, Board has an adequate record, and UP wants the Board use that record to evaluate IPA's claims. Complainants are allowed substantial leeway in many facets of rate litigation, but they are not allowed to alter their case-in-chief to avoid the consequences of their own "strategic choice[s]." *PPL Montana*, 7 S.T.B. at 20.

II. THE BOARD SHOULD MAKE CLEAR THAT IPA MAY NOT DISMISS THIS CASE AND FILE A NEW COMPLAINT CHALLENGING THE SAME RATES.

In addition to denying IPA's Petition to redesign its SARR, the Board should make clear that IPA may not dismiss this case and then file a new complaint challenging one or more of the rates at issue here. IPA threatens to pursue that course if the Board denies its Petition, and it presents its proposal to redesign its SARR as a more "efficient" approach. (Petition at 2.) However, Board precedent establishes that IPA's threatened approach would be unavailing.

Under Board precedent, an "unsuccessful litigant" in a rate case is required to show material error, new evidence, or substantially changed circumstances before it may file a new

[4] The Board was responding to the defendants' argument that the case should be dismissed because the shipper's "opening SAC evidence was so poorly defined as not to permit a meaningful reply." *Id.* The Board concluded that, even though the shipper had made clear errors in its traffic selection process, defendants should have understood what the shipper intended to do, and should have prepared their reply evidence on that basis. *See id.* at 227.

complaint challenging the same common carrier rates it had previously challenged. *Major Issues in Rail Rate Cases*, slip op. at 69; *see also* 49 U.S.C. § 722(c); *Traugott Schmidt & Sons v. Michigan Cent. R.R.*, 23 I.C.C. 684, 685 (1912) (holding that a rate complaint refiled a year and a half after the agency dismissed the shipper's complaint on the same movement "ought to be dismissed as a matter of course unless it appears that the Commission in deciding the original case labored under some misapprehension of fact").

If IPA dismisses its complaint at this stage of the case – that is, after UP has completed its evidentiary submission – it should be subject to the same rules that would apply to any other "unsuccessful litigant." IPA would be attempting to circumvent the rules that would apply if this proceeding were to be completed. IPA would be dismissing the case because it recognizes, after reviewing UP's evidence, that it cannot succeed in obtaining relief. If the Board has any doubt on this issue, it should complete the SAC analysis based on the record (whether or not IPA submits rebuttal evidence).

The Board's method of deciding whether a litigant has justified the reopening of a SAC case can readily be applied to this situation, and it shows why the Board should not allow IPA to dismiss and refile its case. "In deciding whether a litigant has justified the reopening of a SAC case, the Board balances concerns of fairness, accuracy and repose, taking into account the considerable time and expense required to adjudicate the reasonableness of a rate under the SAC test . . . ." *Major Issues in Rail Rate Cases*, slip op. at 67. The factors the Board takes into consideration all weigh strongly against giving IPA a second bite at the apple:

- IPA had a fair opportunity to determine what rates it wanted to challenge and to design an appropriate SARR. The Board even gave IPA extra time to file opening evidence so IPA could factor in its final coal sourcing plans.

- IPA does not claim that the Board's analysis of the record would be inaccurate. In fact, IPA's concerns arose because UP corrected IPA's errors, including IPA's erroneous calculation of divisions from cross-over traffic using ATC, and because the Board corrected its DCF model and ruled on certain cost-of-capital issues in *AEPCO*.
- Concerns for repose and the burdensome nature of rate litigation weigh against allowing IPA to refile its claims. UP has already spent more than $1 million on outside counsel and experts and substantial employee time to develop its reply to the opening evidence IPA submitted. UP is entitled to a final ruling with regard to the case IPA chose to submit, and the repose that such a ruling would provide.

In comparable situations – that is, where proceedings have reached an advanced stage – courts generally do not allow a plaintiff to dismiss its claims in order to avoid a likely adverse decision while allowing the plaintiff the unconditional right to refile later. *See, e.g.*, *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354 (10th Cir. 1996) (affirming the denial of a dismissal sought by the plaintiff after the defendant had filed a motion for summary judgment); *Pace v. Southern Express Co.*, 409 F.2d 331 (7th Cir. 1969) (same); *Williams v. Ford Motor Credit Co.*, 627 F.2d 158 (8th Cir. 1980) (overturning a dismissal granted to the plaintiff after the defendant had filed a post-trial motion for judgment notwithstanding the verdict). Courts have explained that the plaintiff's voluntary dismissal would harm the opposing party by depriving it of the certainty of judgment and subjecting it to additional litigation costs. *Phillips USA*, 77 F.3d at 358; *Pace*, 409 F.2d at 334; *Williams*, 627 F.2d at 160. When courts have allowed a plaintiff to dismiss a case at a late stage and yet grant leave to refile, they commonly require the plaintiff to

pay the defendant's legal fees as a condition of the dismissal. *See, e.g., Shaw Group, Inc. v. Picerne Inv. Corp.*, 235 F.R.D. 68, 70 n.3 (W.D. Pa. 2005); *Independence Fed. Sav. Bank v. Bender*, 230 F.R.D. 11, 15. (D.D.C. 2005). The Board should make clear it will not allow wasteful and repetitive litigation. Complainants should not be allowed to impose substantial costs on defendants, then walk away from an apparently unsuccessful strategy and demand a "do-over."

III. IF THE BOARD ALLOWS IPA TO SUPPLEMENT THE RECORD, IT SHOULD IMPOSE CONDITIONS TO LIMIT THE HARMFUL IMPACT ON UP.

UP strongly urges the Board not to allow IPA to supplement the record and to make clear that IPA will not be allowed to dismiss this case just to file another. However, if the Board does allow IPA to supplement the record, the Board should impose certain conditions to ensure that UP is not excessively harmed by the additional proceedings.

The Board's imposition of conditions designed to minimize the harm to UP would be consistent with precedent. In *Simplified Standards For Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007), the Board recognized that rail carriers are entitled to protection against the burdens they would face if a shipper could change its litigation strategy late in a rate case. The Board determined that a shipper electing to proceed under a simplified methodology may "amend its complaint and seek relief under a different methodology," but only "*prior to the filing of opening evidence.*" Slip op. at 28 (emphasis added). And even prior to the filing of opening evidence, a shipper would "only once" have "an automatic right to amend its complaint without prejudice" – that is, without waiving any of its rights or privileges. *Id.* Here, IPA seeks to make a major change in litigation strategy at a very late point in this case. If the Board allows IPA to file new opening evidence based on its new strategy, it should not allow IPA to proceed "without prejudice" – it should take steps to minimize the harm to UP.

First, the Board should rule that IPA is not entitled to reparations for the period before the Board grants IPA's Petition. If the Board had completed its analysis in this case and found that UP's rates were reasonable, IPA would not have been entitled to any reparations for the period before the Board's ruling, even if it could file a new case immediately after the Board's ruling. IPA's Petition essentially concedes that the challenged rates would be found reasonable using IPA's SARR. IPA should not be able to escape entirely the consequences of such a finding, especially given the substantial costs UP has incurred to reach this stage of the case and the significant additional costs UP will incur in any supplemental proceedings, simply by abandoning its case in the face of anticipated defeat.

Second, the Board should preclude IPA from relitigating the cost-of-capital and terminal value issues the Board resolved in *AEPCO* and from making any other changes to its evidence that are not directly related to the decision to eliminate the portion of its SARR from Provo to Price. IPA asserts that relief is warranted because it would have designed its SARR differently had it known in advance about the Board's resolution of the cost-of-capital and terminal value issues in *AEPCO*. If IPA simply wanted to argue that the Board had not resolved those issues correctly in AEPCO, it could have made those arguments in its rebuttal or in its brief, without supplementing the record. If the Board decides that IPA may redesign its SARR, it should hold IPA to its representation and require that IPA's supplemental evidence incorporate an industry average cost-of-equity for IPA's SARR and a terminal value calculation that is consistent with the Board's decision in *AEPCO*. The Board should also make clear that IPA does not have an unrestricted right to redesign its SARR. IPA asserts that it is entitled to relief that allows it to eliminate the Provo to Price portion of its SARR and its Petition, and it has attempted to justify

that one change to its SARR configuration. The Board should not allow IPA to make changes that it did not identify or explain in its Petition.

Third, the Board should not impose the procedural schedule proposed by IPA. Parties in SAC cases typically negotiate schedules. They do so to avoid situations in which lawyers and experts that are critical to the case will be faced with significant conflicting demands on their time. The Board should allow the parties to negotiate a schedule that is mutually acceptable.

CONCLUSION

UP urges the Board to reject IPA's Petition. IPA is not entitled to reconfigure its SARR. The Board should also make clear that IPA cannot avoid the rules that apply to unsuccessful litigants by dismissing this case and filing new claims. If the Board grants relief to IPA, it should condition that relief to avoid excessive harm to UP.

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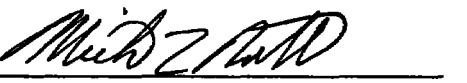

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December 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2011, a true and correct copy of Union Pacific Railroad Company's Reply to Complainant's Petition to Supplement the Record was served by e-mail and first-class mail, postage prepaid, on:

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